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No. 73-225

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

SANDRA HALLER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

VARON, STAHL and KAY, P.A.
and PHILIP A. GILLIS
By: Philip A. Gillis, Esq.
Attorneys for Petitioner
5th Floor
American Title Building
Detroit, Michigan 48226
962-8210

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
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I.

Conceding that "this Court has never determined standards for admissibility of predisposition evidence" in entrapment cases and as a result the several courts of appeals have adopted "varying approaches", the government argues that this Court should not grant certiorari because "resolution of this context-dependent, evidentiary question may properly be left to the courts of appeals."

For this jawbreaking pronouncement, the government relies upon *Palmero* v *United States*, 360 US 343. But *Palermo* was an entirely different situation. The court was construing a recently-enacted discovery statute, 18 USC 3500, which was quite explicit in its terms:

> Since we feel the statutory standard has guiding definiteness, it would be idle to attempt a minute enumeration of particular situations to which it is to be applied. 360 US at 353.

The defense of entrapment was born out of decisions of the courts rather than laws of Congress. This Court has yet to define the standards of proof. Indeed, it has never determined whether probable cause of the officers to act is even an issue.* The irreconcilable conflict of the circuits is the inevitable result.

The government downplays the conflict, admitting only that "there appears to be some difference in the treatment of this issue by the various circuits." But, to take only one example, contrast the rule of the Third Circuit:

> This brings us to the legal question whether, when entrapment is in issue, testimony reciting a statement of an absent person which in fact indicates that the accused was predisposed to criminal behavior should be admitted even for the stated limited purpose of showing that the officers were

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* In his concurring opinion in *Sorrells*, Justice Roberts read the opinion of the court as approving the practice of allowing the government to "show in rebuttal that the officer . . . has reasonable cause to believe the defendant was a person disposed to commit the offense." 287 US 458. As our petition notes, only the Ninth and Tenth Circuits require a showing of probable cause; the Fifth and Eighth Circuits allow a showing of probable cause; and the First, Second, Third and Fourth Circuits exclude all evidence on the subject.

> justified in or had probable cause for providing the accused with an opportunity to commit the crime in question. We hold that such evidence is inadmissible. *United States* v *Catanzaro,* 407 F 2d 998 (1969) 1001.

with the rule of the Fifth Circuit:

> We have repeatedly held that once the defense of entrapment is raised the government may introduce hearsay testimony concerning the defendants' past reputation as bearing upon the defendant's predisposition to commit the crime and the reasonableness of the conduct by the government agents.
>
> *United States* v *Robinson,* 446 F 2d 562 (1971)

That is *some* difference.

According to the government,

> The hearsay testimony admitted here would pose a more troublesome question were the evidence of entrapment substantial. [Government brief, page 8]

But the petitioner was hardly "vague and uncertain" in her testimony, as the government claims. For example, consider the following cross-examination of her:

> Q. Do you ever recall an occasion when you and Mike sold the agent something purporting to be heroin?
>
> A. Yes.
>
> Q. When was that?
>
> A. That was after I had stopped using heroin. I had people that had been—these people came

over, asked me to get them some. I said "No, Michael." I said, "No. I want no longer to be connected with it." And they went on and on and on and on, and finally, you know, we decided to get them off our backs.

Q. Is it your testimony that they hounded you and hounded you to buy heroin?

A. Hounded and hounded. They asked us. They were in need of it, so, you know, the man he had been getting it from, they couldn't get it and they needed it.

[Transcript, 62-63]

In opposing discretionary review, standard procedure is to suggest to the appellate court that the challenged ruling turns upon the peculiarities of the record below. But here the entrapment issue was raised* and the double and triple hearsay of the government was admitted only because it was raised. The record squarely presents the issue for review and the ruling of the Court of Appeals of the Fifth Circuit is squarely in conflict with those of at least four other circuits.

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* In this respect, the record differs significantly from that in *Perry v United States*, 478 F 2d 1276 (CA 7, 1973), cert. denied Nov. 5, 1973 (73-5091). Perry did not testify and the Court of Appeals found "no basis for submitting the issue of entrapment to the jury." *id*, 1277-1278.

The *Perry* opinion is instructive in its review of some of the conflicting decisions of the courts of appeals.

II.

McCray v *Illinois*, 386 US 300, 305 said only that, before trial, "when the issue is not guilt or innocence but . . . the question of probable cause" the Constitution does not require disclosure of the informer's identity in a State prosecution. It does not answer the question we present.

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